FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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May 19, 2011

SECRETARY OF LABOR,	:	CIVIL PENALTY PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEVA 2009-1617
Petitioner	:	A. C. No. 46-09150-186782-01
	:	
v.	:	
	:	
MOUNTAIN EDGE MINING, INC.,	:	Dorothy No. 3 Mine
Respondent	:	

DECISION AND ORDER

Appearances: Jonathan Marcus, Esq., Secretary of Labor, Office of the Solicitor, representing the Mine Safety and Health Administration;
Eric Thomas Frye, Esq., Flaherty, Sensabaugh Bonasso, PLLC, for Respondent.

Before: Judge Moran

In this case involving one section 104 (d)(1) citation, (No. 8081161), and two section 104(d)(1) orders, (Nos. 8081168 & 8081212), the Secretary of Labor, Mine Safety and Health Administration, ("Secretary," or "MSHA") alleged that Mountain Edge Mining, Inc. ("Mountain Edge") violated its approved roof control plan by mining at widths which exceeded its roof control plan, as set forth in Citation 8081161, that it failed to follow its approved ventilation plan, as set forth in Order 8081168, and that it failed to record the results of tests for methane in any of nine working places, as set forth in Order 8081212. For the reasons which follow, the Court affirms the citation and both orders, the special findings associated with each of them and, based on the facts developed at the hearing, imposes an increased penalty for the 8081161 and 8081168 violations, and adopts the penalty, as originally proposed for Order 8081212.[1]

[1]All post-hearing briefs were fully considered. Arguments not specifically addressed were either implicitly dealt with in this decision, rejected, or considered unnecessary to specifically address.

Findings of Fact – Conclusions of Law

Citation 8081161

Jack Hatfield, Jr., MSHA coal mine inspector testified with regard to all of the alleged violations in this case. Inspector Hatfield's coal mine experience is extensive, going back to 1970. Tr. 23. First addressing Citation 8081161, issued April 1, 2009 for an alleged violation of 30 C.F.R. 75.220 (a)(1), which pertains to the mine's approved roof control plan, Hatfield was aware that the mine's plan allowed 18 foot mining widths. That, he noted, was unusual, as typically such widths are 20 feet. Tr. 36-37. This was no secret, as signs were posted at the mine reminding miners of the 18 foot width limitation. Upon entering the mine, Hatfield immediately sensed that the widths seemed to be in excess of that limitation. Tr. 38. At that time of this inspection Hatfield was with the mine superintendent, Ralph Tabor. Tr. 38. Upon stopping to check his impression, Hatfield found that indeed the widths were in excess of 18 feet. Tr. 39. On the 001 Mechanized Mining Unit, or "MMU," Hatfield noted that the mining was nearing the outcrop, that is, the point where the coal seam ends, as surface is reached. Hatfield stated that as one moves towards the outcrop the likelihood of roof control problems increases. Tr. 42. At any rate, per his citation, Hatfield used a tape measure and found that the mining widths on the 001 MMU exceeded the 18 foot width "in numerous locations and the entries and adjoining crosscuts up on the section." Tr. 43. He had brought maps of the mine, section prints, with him underground and he proceeded to mark down the measurements. Hatfield marked on those section prints the locations where he found excessive widths. Tr. 39-44, GX 4. Mr. Tabor and, for some of the measurements, Roger Justice, held one end of tape, while Hatfield held the other end. Significantly, in terms of reliability of his findings, Hatfield noted the measurements taken right on the map he had with him and did so immediately upon taking each measurement. Tr. 45. Where a measurement was not excessive, he would note "OK." Tr. 46. Hatfield's notations of excessive widths were only recorded where they were greater than 5 feet long. Tr. 48-49. This is because exceedances over the 18 feet are only a violation when they continue for more than 5 feet. Tr. 49.

Of importance to the finding of violation made here but also as to the appropriate penalty to be imposed, Inspector Hatfield found over 50 of these violations, as reflected on his map. Tr. 51. Addressing the suggestion that a slopping roof makes it more difficult to mine precisely, and that width exceedances are therefore unavoidable, Hatfield acknowledged that there was a grade, but that one has to take more time in making cuts and may have to make a shorter cut under such circumstances. Tr. 52. This approach allows one to do a good job keeping the center lines correct. Hatfield knew that this mine had adverse roof and a history of roof falls. Tr. 53. Coal rider seams present a problem at this mine because if one does not anchor above such a seam, the roof may fall. Tr. 53. GX 2 represents an accident report for this mine, covering February 1, 2007 through March 6, 2009. The report reflects 12 roof fall accidents during that period. Tr. 56. Hatfield believed that number of such roof falls led to the requirement for18 foot wide entries. Tr. 56. Whatever the origin, the 18 foot limitation did not simply materialize without a reason.

This was later acknowledged through the testimony of Respondent's witness, Frank Pearson, who acts as consultant for the Respondent in a variety of areas: production, safety and cost. Tr. 314. Pearson agreed that there was an old mine, worked out, above the Dorothy No. 3 and that the old mine is from 50 to 120 feet above it. Tr. 323. He also agreed that there were bodies of water above the Dorothy, but asserted that they had monitored them and drained them. Tr. 323. Of particular significance to this violation, while Pearson stated that there was no history of roof falls *in the section* cited, he did concede there were undetected rider seams at this mine and that there had been "problems." Tr. 324. This explains the basis for the origin of the 18 foot width limitation. Further, while he expressed that sandstone was the safest top one can have, he concluded, "all top, you know, can fall." Tr. 325.

In his citation, Hatfield wrote that the "mine roof is primarily sandstone with areas of slate joints, horsebacks and kettlebottoms.[2]" Tr. 57. The roof also had areas with a slate joint butting up against the sandstone. This presents, he expressed, a dangerous situation, because the slate, a horseback, will fall with little or no warning. Tr. 57. Where these conditions exist, with the slicksided slate up against the sandstone, there is no binding between the two formations. Tr. 58. At any rate, each of these is considered to be adverse roof conditions. The presence of these problems makes the failure to comply with the 18 foot width requirement more serious. Tr. 60.

As noted, the mine's approved roof control plan requires that entry widths and crosscut widths be at a maximum of 18 feet. Tr. 63. Hatfield also pointed to a number of items which served to confirm what was not in any genuine dispute in this proceeding; this mine has long had adverse roof conditions.[3] Tr. 67.

To abate the violation, supplemental roof support, consisting of timbers, were installed. Tr. 74. Some 215 such timbers, each of which are generally 6" by 6", were installed. Tr. 74. Hatfield marked "reasonably likely" for the box addressing the likelihood of an injury or illness. Tr. 81. He also marked that such injuries would be "permanently disabling," and credibly explained the basis for that view. Tr. 82. Similarly, he rationally explained the basis for his marking the violation as "significant and substantial." As to negligence, the inspector marked that it was "high" because of the extensive nature of the violation. In his words, the excessive widths were "everywhere." Tr.84. Further, as noted at the outset of this decision, warnings were everywhere that they were to mine at 18 foot widths. Tr. 84.[4] The Court expressly adopts

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[2] "Kettlebottoms" are basically coal-encrusted petrified tree stumps. They are not found in sandstone top. Rather they are found in slate or shale tops. Tr. 58. A "horseback" is a slang coal term, also referring to pieces of petrified wood.

[3]While observing this, the Court was fully cognizant of the Respondent's contention that *in the particular area cited* the roof appeared better.

[4] Hatfield noted that management people were on the section, the mine had signs posted on the surface about the 18 foot limitation, and the approved roof control plan also expressed that

Hatfield's special findings as its own.

Hatfield stated that mine management admitted that there were violations. Hatfield knew this, in part, because he asked the boss how wide they were to mine and the response was that it was to be 18 feet. Tr. 88. Tabor and Justice, who helped Hatfield take the measurements, admitted to him they were wide and the Court explicitly finds this to have been the case. Tr. 89.

On cross-examination, Hatfield was directed to the original of the map he used when he took his measurements. Instead, at the hearing, Respondent was only provided with a copy of the map, which is Exhibit 4. Respondent's Counsel's complaint was that the original map was not provided to it, despite having made a FOIA request. Tr. 173. Any FOIA failure was not Hatfield's doing. Nor did Respondent show it suffered any disadvantage from the omission.

Moving to Hatfield's measurements, it is sufficient to note that cross-examination did nothing to diminish the accuracy of the inspector's findings. Hatfield acknowledged that he had no actual knowledge of whether there were rider seams within 10 feet of the cited area. Tr. 178. He also acknowledged that he saw no roof falls, rib sloughage. Tr. 179. In terms of "kettle bottoms," which he agreed is the root base of an ancient tree, it was Hatfield's position that, by mining too wide, a kettle bottom could fall out. Tr. 181. Supplemental roof support is required if one encounters a kettle bottom. Although the inspector had never seen kettle bottoms in sandstone, he noted that the mine's top was *not* all sandstone. Tr. 183. Hatfield did not know whether the *current* roof control plan (as opposed to the plan *in effect* at the time when he made the inspection relating to this case) calls for 20 foot openings where sandstone is encountered. Tr. 184. Such issues are not relevant here anyway.

On his map Hatfield did record measurements greater than 20 feet wide. Tr. 185-186. As part of his actions concerning this matter, Hatfield did speak with the continuous miner operator, inquiring why he was cutting wide. Tr. 189. However, no explanation was offered. He advised the continuous miner operator that he needed to "take his time more." Tr. 190. Hatfield maintained that the condition was obvious in that, if one had sufficient experience, one could "eyeball" it, as he obviously did, and tell right away that it was wide. Tr. 194.

Respondent's witness Ralph E. Tabor, who is currently a foreman for Hanover Resources, was in April 2009 the mine superintendent for Mountain Edge. Tr. 232. He stated that he wrote down the measurements on a map but that his measurements were not recorded on GX 4. Instead, Tabor stated that he recorded the measurements on GX 5. Tr. 235. A review of GX 5, especially when compared with Hatfield's numbers on GX 4, reveals that the former is not useful and primarily serves as a defensive exhibit by prominently asserting that there is a steep slope, causing everything to slide to the right. Although Tabor stated that most of the exceedances were less than 19 feet and he could not "recall" if any were as wide as 20 feet. Tr. 236. Tabor, who held one end of tape, did not hold the end that reflected the widths found. Tr. 238. After a

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limitation. Tr. 84.

measurement was taken, Tabor would mark "how many timbers it would take to take care of the wide spot." Tr. 238. Though he had been to the area earlier that day, he did not notice any wide spots. Tr. 239. Tabor maintained that as they were advancing the entry they were moving downhill and that this made it more difficult to keep within the 18 foot width limit. Tr. 244. As to the number of timbers that actually had to be set to abate the condition, Tabor stated he did not know, as he "didn't count them," although the number 215 appears on GX 5 beside the description "Total Timbers." Tr. 240.

Accordingly, consistent with the Court's credibility determination, above, it is found that in critical aspects, Tabor's testimony must be discounted. He held the non-measuring side of the tape, he could not recall if areas were as wide as 20 feet, and he didn't count how many timbers had to be installed. Even Tabor admitted the widths were over 18 feet, "we [Hatfield and Tabor] measured across the section and *all these wide places*." Tr. 241-243. (emphasis added).

Respondent also called Frank Pearson on this violation. He acts as consultant for the Respondent in a variety of areas: production, safety and cost. Tr. 314. When asked if he had been to the cited wide area, he responded that he had, describing it as "basically not wide." Tr. 316. His view was that one can't "mine anywhere without cutting a wide place here or there." Tr. 316. As with Tabor, he too maintained that due to slants in the road, it was real hard to maintain straight entries. Although he agreed that journeymen roof bolters would know if an entry was wide as they did their job, no roof bolters complained to him that the area was wide. Tr. 320. He also stated that the roof was then and remains today, standing, with no problems. Tr. 321. Critically, Pearson conceded that he was not present on the day the citation was issued, but rather visited that area a day or two later. Tr. 338. Thus he agreed he was not there to see what Hatfield observed at the time the citations were issued. He also agreed that, while the slope presented compliance issues, it did not make it impossible to comply with the roof control plan in the area cited. Tr. 340. Incredibly, Pearson expressed that a wide place "here or there" could mean 50 times in adverse conditions. Tr. 340. It must be said that Pearson's testimony did not advance the Respondent's defense.

On cross-examination, Tabor, who earlier had stated that he took notes regarding these issues, could not produce them, stating that "I'd say when I cleaned out my desk I throwed them away." Tr. 257. As to whether Hatfield had a map with him, Tabor admitted that he did not know if Hatfield had a map in his front pocket. Tr. 258. Further, Tabor admitted that he wasn't there for all the measurements but that Roger Justice took over for part of the measurements. Tr. 258. Nevertheless, Tabor insisted that Hatfield's measurements were incorrect. As one example, he offered up that by adding only 5 timbers at one location, it could not have been 19 feet wide for the entire 80 foot area. Tr. 260. In sum, Tabor stated that he recalled no 20 foot measurements and only "some" that were 19 feet. Tr. 262-263. He did recall one at 19.6 feet. Tr. 263. The Court did not find Tabor particularly credible.

Accordingly, regarding Citation 8081161, the Secretary clearly established the violation. Just as clearly, this violation was significant and substantial, unwarrantable, and the enhanced

penalty sought by the Secretary is appropriate. Here, the violation occurred in the context of an abject failure to follow the roof control plan in 52 separate places, where the maximum mining entry width exceeded 18 feet. This was done despite the mine's own obvious reminders to itself to not exceed the 18 foot limitation, as Hatfield observed.

As to the "S & S" aspect, the record supports the conclusion that there was a discrete safety hazard, a measure of danger to safety, contributed to by the violation because per force exceeding the maximum width increased the likelihood of a roof fall. To conclude otherwise would mean that the maximum width requirement was meaningless, a mere number inserted in the plan. But that number did not come out of the blue, it arose as a result of roof control problems at this mine. As to the twin "reasonable likelihoods" required by the *Mathies* decision, it was shown that there was a reasonable likelihood that the hazard will result in an injury both because the exceedances were present and because of the other factors, described by Hatfield, in this section. This included the risk of slate joint, kettle bottoms, horsebacks and the fact that mining was progressing toward the surface. The other "reasonable likelihood" element was also established and can hardly be disputed. Roof falls, by their nature, often carry the risk of permanently disabling injuries. All it takes is a person being in the wrong place at the wrong time. Here, miners were exposed to the risks resulting from the wide spaces.

Addressing the unwarrantable claim, ofttimes described as high negligence or aggravated conduct, constituting more than ordinary negligence and showing indifference or a serious lack of reasonable care, the Court finds that the violation did involve unwarrantable failure on the Respondent's part. In this regard it bears repeating that Inspector Hatfield found the exceedances in 52 locations. That, by itself, establishes an unwarrantable failure. Beyond that, though unnecessary, the mine knew of both the history of its roof control problems and the resultant requirement for the 18 foot width limitation. Further, there was a disconcerting tone presented by the Respondent's witnesses that, either they didn't notice the problem, though immediately obvious to Hatfield, or that complying with the plan was difficult and that, at least in Pearson's view, 50 such exceedances was just part of mining where adverse conditions exist.

Exercising its authority to impose an appropriate penalty, either lowering, raising, or accepting the originally proposed amount, the Court here agrees that the $70,000.00 now proposed by the Secretary is justified. This enhanced penalty is justified both by the extent of the large number of violations and by the Court's assessment of the low credibility of the Respondent's witnesses in this regard. The unwarrantability finding, next above, also justifies the increased penalty. Further, as pointed out by the Secretary, the original assessment made no distinction between a single width exceedance and the 52 found here. Thus, based on the negligence involved, the inherent gravity associated with roof control violations, the fact this mine had a history that required it to mine at 18 foot widths, instead of the more usual 20 foot widths, the penalty imposed is appropriate. The size of the operator, with the Dorothy No. 3 being a medium to large mine and Mountain Edge itself a large operator, coupled with its history of roof falls, (GX 2, Tr. 57-61 and 81-82), do not operate to reduce this amount. While the violation was, upon being cited, abated in good faith, and as the penalty will not effect its ability to continue in

business, neither of those factors operate to reduce the penalty imposed here.

Order 8081168

Turning to Order 8081168, issued April 2, 2009, Inspector Hatfield cited the mine for a violation of 30 CFR 75.370(e). Tr. 92, GX 1. That standard requires workers to be advised as to changes in ventilation plans.[5] The inspector noted that the mine was on a reduced standard because of the presence of quartz.[6] Continuing with his earlier reference that he had previously discussed the insufficient air with the foreman, Hatfield related that the section foreman told him they had 3,000 cfm.[7] Tr. 107. While the foreman showed Hatfield his notes reflecting the 3,000 cfm, Hatfield advised that the requirement was in fact for 4,500 cfm, which amount is considerably more. Tr. 108. Hatfield also determined that the miners had no idea how much air they were supposed to have behind the end of the line curtain. Tr. 109. More importantly, mine

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[5] In the context of the alleged violation reflected by Order 8081168, GX 9 includes within it a section 104(a) citation, Citation 8081159, for an alleged violation of 30 C.F.R. 75.370(a)(1), issued the day prior to that Order 8081168, on April 1, 2009. Tr. 93. That citation, issued for MMU 1, was for a failure to follow the ventilation plan in that there was insufficient air velocity. The next day, Hatfield issued Citation 8081166, for another alleged violation of 30 CFR 75.370(a)(1), involving a violation of the mine's approved ventilation plan for methane and dust control. This was cited at MMU 002, the mine's other section. For that citation Hatfield observed visible dust where the roof bolt crew was working in the No. 2 heading. Tr. 97. Upon taking an air reading behind the end of the line curtain, he found there was insufficient air. He measured it at 1,908 cfm and the plan required 4,500. Tr. 97-98, 105. Hatfield spoke to section foreman Tim Shrewsberry about this and was advised that they were going to get to that. Tr. 98, 114. The foreman is supposed to know about the methane and dust control plan's requirements. Tr. 114. Yet, both Shrewsberry and the superintendent, Ralph Tabor, seemed to not know about the correct, that is to say, the minimum *required* amount under the plan. Tr. 115. While GX 7, which was attempted to be included in the evidentiary record, reflects a citation Hatfield issued to Ralph Tabor on April 2, 2009, shortly after he had issued 8081166, that Exhibit was not admitted because the matter is still in dispute. Tr. 105. However, Citation 8081166, GX 9, noted above, was admitted.

[6] As alluded to in the earlier discussion of the excessive mining width violation, the Dorothy 3 is underneath Big Mountain 16. There is only about 90 feet separating the two. Big Mountain 16 has a lot of water in it and Hatfield advised that this can be a source for trapping methane. Tr. 119.

[7] As noted, Hatfield's measurements were decidedly less than the foreman's reading as he found only 1908 cfm. Tr. 111. Hatfield however did not contend that the foreman's *reading* was inaccurate. Differences in the anemometer used and the recency of its calibration can account for this. Tr. 112. A line curtain coming down can also be a source for accounting the different readings. Tr. 113.

management people did not know about the minimum requirements under the ventilation plan. Tr. 110.

GX 8 reflects the approved methane/dust control plan for the 002 MMU. It is dated December 23, 2008 and it was in effect at the time the citations were issued and it reflects that the Plan requires that the CFM is to be at least 4,500.[8] Tr. 116-117.

Referring back to GX 1, Hatfield agreed that it reflects that the MMU is on a reduced standard of .9 mgm3 because of the presence of quartz. Tr. 120. Where quartz is present, miners need to be exposed to much less dust because of the risk of silicosis. Hatfield could *see* dust in the air at that location. Tr. 121. The Court expressly finds that Hatfield's testimony was in fact the case; he did observe such dust. There is also no dispute that quartz is present with the dust at this mine. His visual observations prompted him to take a reading at the line curtain and the results showed that the miners were not getting sufficient air.[9] Tr. 122. Thus, the reading confirmed what he had visually observed. Tr. 122. To Hatfield's consternation, the supervisors did not know the correct air requirement. Tr. 122. Hatfield's position was that management is held to a higher standard than the crew and accordingly that they *should know* the air requirements. Tr. 124. The Court agrees. Hatfield also expressed that the crew should know what the air requirements are too, but they have to rely upon management to correctly advise them of those requirements. Here, no one volunteered the correct information.[10] Tr. 124. It was management's lack of knowledge of the ventilation requirements that caused Hatfield to deem the violation as unwarrantable. Tr. 139.

Hatfield marked the gravity for 8081168 as "reasonably likely" for injury or illness because he believed that exposure to this dust made it of such likelihood that the miners would contract silicosis or "black lung." Tr. 128. He also marked the violation as "significant and substantial" because he believed it to be reasonably likely that there would be serious illness from such dust exposure.[11] Tr. 130. Even apart from the presence of quartz, Hatfield still would have marked the violation as S & S because, while perhaps not permanently disabling, such dust exposures could still lead to lost workdays. Tr. 132. He felt the negligence was appropriately marked as "high" because management people did not know what the air requirements were. Tr. 132.

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[8] Note that GX 8, in the official record, is several pages long but that a blue divider sheet was apparently inadvertently added by the reporter. Thus, although the divider is present, the exhibit continues after that first page.

[9] Later, one of the crew told Hatfield that the air was chronically insufficient. Tr. 127.

[10] To his credit, Superintendent Tabor did apologize to the crew for not knowing the correct requirements and for failing to review the particulars of the ventilation plan with them.

[11]Six (6) miners were exposed to the dust conditons.

Directed to GX 10, copies of 5000-23 forms, which forms relate to employee training, such forms are to reflect annual training given to certain individuals. However, those forms do not reflect that those listed individuals were trained in methane and dust control. Those subjects are to be part of such annual training.[12] Tr. 135.

Regarding the training requirement identified in the citation, Hatfield stated that Shrewsbury and Tabor were present when he asked questions about the training.[13] Tr. 197. Tabor, referring to this dealing with ventilation and the crew's lack of awareness as to the required amount of air, stated he was not present for this issue. Tr. 247. However, he maintained that the men were trained on the ventilation plan.[14] Tr. 247. Significantly, Tabor could not recall what the required CFM was for the section. Tr. 248.

Tabor having affirmed that he was not present when Hatfield issued that Order, necessarily agreed to not knowing about any conversations between Hatfield and those at the scene when the Order was issued. Tr. 265. While Tabor insisted that *he did know* how much air was required under the plan, when asked if he told Hatfield what that amount was, he responded, "I don't remember telling him that. I could have. I don't remember." Tr. 266. Thus, in critical areas of his testimony, Tabor's memory failed him.

Shown Ex 8, Tabor agreed that the methane and dust control plan requires 4500 cfm. Despite agreeing that this was readily discernable, Tabor still maintained that members of the crew had difficulty interpreting the plan because they didn't know of the requirement. Tr. 268. Shown Ex 10, the 500-23 forms, for David Crone and Jason Atkins, which reflect that those men had training in the provisions of the form, Tabor agreed those forms reflected such training. Tr. 269. As for foreman Tim Shrewsbury, Tabor had "no idea" where his training certificate form was. Again, the Court views the attempt, insufficient as it was, to show that miners had received

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[12]David Crone III, a roof bolter, and Jason Atkins were the individuals listed. It was Crone who advised Hatfield that his boss had told him they were getting sufficient air. Tr. 138.

[13] Respondent's counsel tried to make inroads in this area, inquiring if Hatfield actually attended the miners' training, knew what was covered in the refresher training, or whether he asked for their training forms. Although Hatfield answered in the negative to each of the questions, he reminded that it isn't simply about conducting such training but that, as plans change, the miners need to be informed about those changes too. Tr. 197. Here, it was clearly established that the miners had no idea about the required amount of air.

[14] Tabor attempted to draw a distinction in the apology he made to Hatfield, asserting that he apologized for misinterpreting or misunderstanding the ventilation plan, but he maintained his apology did not speak to any alleged lack of training on the plan, as he asserted that the miners were trained. Trained or not, it is not necessary to resolve that issue for this Order. However, it would be fair to comment that, if it did occur, the effectiveness of it was wanting.

training on this issue, as missing the point. Thus, this information serves only to distract and is not considered to be a mitigating factor in any sense, both because of its insufficiency and because it was ineffective if it is assumed that all were so trained. The key here is that no one knew at the time of the citation being issued how much air was required.[15]

Hatfield repeated that, upon asking the miners if they had been instructed on their plan, with management people present at that time, he then issued his order, shutting down the section and establishing a meeting concerning the ventilation requirements. Tr. 200. He noted that no one from management protested that action; no one asserted that they had all their training and knew the requirements. To the contrary, noting that, Hatfield stated that management's reaction to his order was "almost apologetic," he concluded that it was clear that management had not

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[15] Because the following is deemed to be more of the same distraction and not considered to be mitigating, this has been footnoted: David Justice, mine superintendent at Mountain Edge, was also called by the Respondent. Tr. 273. At the time of these citations he was the mine foreman. Tr. 274. Referring the witness to citation 8081168, GX 1, Justice disagreed that the mine had failed to give the men proper instruction regarding the ventilation plan. Tr. 275. Justice stated that *he* had trained the men on the plan in February of that year. Justice also affirmed that Ex 8 reflects what he trained the men about at the annual refresher. All employees received this training. Tr. 276. He took offense at the citation because, to him, it implied that no one was listening to him during the training. On cross-examination, Justice agreed that the records at the hearing only reflected that Crone and Atkins were trained, at least based on the certificates of training that were presented. Tr. 278. In response to questions from the Court, Justice stated that the training lasts about an hour and that about 25 to 30 miners are in attendance. Tr. 282-283. However, he stated that, though he gives the training, he doesn't fill out the form for everyone who is trained, although he signs it. At any rate, he agreed that in the course of a year, as there are four different classes in a year, there would be on the order of at least a 100 such forms per year. Tr. 284. These forms then are kept as mine records in its files. Counsel for the government stated that it tried to reach these records, but only received the two forms presented at the hearing. Tr. 285. That is indeed the case, evidentiary-wise. Although Counsel for the Respondent stated that it was under the impression that the government only sought such records from the two individuals, Crone and Atkins, it is hard to understand why the Respondent would not have provided all the records anyway, as it apparently did view this information as helpful to its stance. Tr. 286. For the same reasons, Respondent's testimony from David L. Crone III, a roof bolter who was also performing that same task back in April 2009 at the mine, was not illuminating to the issues, nor otherwise informative. Tr. 289. Crone stated that he had been trained as to the ventilation plan in April 2009, but he could not recall the date of his training. Tr. 290. He also identified Ex 10 as his training form for his 2009 annual refresher training. Tr. 291. However he could not recall being asked by Inspector Hatfield about the ventilation plan in April 2009, nor could he recall other aspects of any conversation between them, stating that Mr. Hatfield does not talk a lot. Tr. 294. The Court did not find this witness to be especially credible.

instructed the men about the plan.[16] Tr. 200.

Respondent's counsel did establish that Hatfield's notes do not record that he observed visible dust in the section. Tr. 202-203. His order did not state that either. Hatfield agreed that MSHA's instruction to its inspectors is to record such observations, but that this policy did not come into effect until after the citation in issue here. Tr. 204. While he couldn't state how long the miners on the section had been exposed to excessive dust, he did note that he was in the process of making an imminent danger run when he observed the problem. As evidence of the gravity of the situation, Hatfield decided to stop his imminent danger run and speak to the roof bolter right then. Tr. 205. While Hatfield did not know how long it takes before adverse consequences may occur to a miner from exposure to silica, that hardly diminishes the gravity involved. Any exposure to such dust, or respirable dust without silica for that matter, is a serious matter. MSHA cannot be at every section of every mine 24/7. Thus, even an incremental step down the road to respiratory disease must be taken very seriously.

Clearly the violation was established here. Individuals simply didn't know what was required, had it wrong, or were advised they had enough air. No documentation contradicts this conclusion. Even if it is assumed, for the sake of argument only, that training was given, it was manifestly ineffective. The section involved requires that *before* implementing an approved ventilation or a revision to a ventilation plan, persons affected by the revision shall be instructed by the operator in its provisions. This requirement necessarily carries with it the requirement that miners be *adequately and effectively* trained by such instruction. *Secretary of Labor v. Western Fuels-Utah, Inc.*, 900 F.2d 318, 320[17] (D.C. Cir. 1990) and *RAG v. Cumberland Resources LP*, 26 FMSHRC 639, 647 (Aug. 2004). [18]

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[16] Respondent's counsel suggested that perhaps the inspector had intimidated everyone and that they were reticent to speak up and challenge his actions. However, Hatfield rebutted this claim, noting that he knew David Crone, as well as his father and his grandfather and that having worked with all of them, there could be no element of shyness to speak up, had a counter claim been credible. Tr. 201. Instead, when he asked the youngest David Crone, if he knew how much air they were supposed to have, his response to Hatfield was that "the boss told me we had enough, Jack." Tr. 201. The Court finds that this response was made.

[17] The full quote from the D.C. Circuit stated that "Section 115(a) of the Mine Act is intended to insure that miners will be effectively trained in matters affecting their health and safety, with the ultimate goal of reducing the frequency and severity of injuries in mines. 43 Fed.Reg. 47,454 (October 13, 1978). Indeed, Congress considered training to be of such great importance that it specifically empowered inspectors to withdraw untrained miners from the mines and to prohibit their reentry until they received proper training. 30 U.S.C. § 814(g)." 900 F.2d at 320.

[18] Although *RAG v. Cumberland Resources LP*, dealt with a bleeder ventilation, the principle is fully applicable that whether it be a system or training, to have meaning they must be

This violation was significant and substantial. Again, applying the second element of *Mathies*, the first having been discussed, a discrete safety hazard was demonstrated by virtue of the foreman and crew's ignorance of the ventilation plan's requirement. This apparently prompted them to continue working away despite the presence of visible dust, at less than half the required amount of air and in a dust made more treacherous by its quartz content. So too, as for the twin "reasonable likelihoods" required by the *Mathies* decision, it was shown that there was a reasonable likelihood that the hazard will result in an injury. Even if the dust had no quartz, Congress's concern fully reaches coal dust without that additional grave characteristic. It is obvious that working in conditions of visible coal dust is adverse to one's health. Further, even short term lung problems from such exposure such as bronchitis or inflammation are serious injuries to one's health.

The violation was also unwarrantable. As the Secretary points out, the conditions present here, as exacerbated by the presence of quartz in the dust, required a higher standard of care on the mine operator's part. Sealing the finding of unwarrantability here, supervisory people were present yet ostensibly ignorant of the amount of air required under the approved plan. In the Court's view, the roof bolter's statement to Inspector Hatfield that the miners "never have any air in this place," a remark which the Court finds was made to the Inspector, was telling.

Given the entirety of the circumstances disclosed during the course of the hearing and the Court's findings regarding the collective absence of knowledge of the amount of air required, when coupled with Congress' long-standing deep concern about chronic lung diseases acquired by those in the occupation of coal mining, the Court agrees that, in these circumstances the enhanced penalty proposed now by the Secretary should be and is adopted here in the sum of $54,732.00. None of the other statutory factors, each of which have been considered, operate to reduce that amount.

Order 8081212

Last, Hatfield was asked about his Order, number 8081212, issued April 20, 2009, in which he cited a violation of 30 CFR 75.360(f). Tr. 141. That standard requires that results of examinations are to be recorded in a book on the surface. Tr. 142. In order to have been in compliance for this violation of Section 75.360, the operator should have not simply written for hazards, "none observed" for the Number 1 heading, but rather should have included the methane readings and the air quality readings for the working places. Tr. 164.

GX 12, dealing with Citation 8081200, issued April 17, 2009 was issued because the book similarly did not reflect any methane concentrations. Tr. 144. Citation No. 8081206, issued April

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effective. Accordingly the absence of the literal word that a system or training be effective is no barrier. Following the analogy presented by *RAG* if such reasoning were adopted then any training, however useless, would pass muster and as the Commission has expressed it, lead to an "absurd result."

18, 2009, also cited 30 CFR 75.360(f). This was attributable to the lack of a record of examinations to the approaches of the abandoned panel with AMP's[19] No. 1, 2 and 3. Tr. 145. Intake air passes these approaches and ventilates the working place. Tr. 145. These areas are required to be preshifted and the results recorded. The same was true for Citation 8081207, also involving a violation of 30 CFR 75.360(f). The distinction is that they relate to different record books and different areas of the mine. Tr. 146. These approaches, as they still bring intake air, are to be preshifted three hours before workers go underground. Tr. 147. Although Counsel for the Respondent belatedly advised that these citations were being challenged, they were admitted for a limited purpose. Tr. 149. This ruling came about because Counsel for the Secretary's restricted purpose for their admission was to show that the operator was put on heightened alert as a result of their issuance. That is, that they were advised about the requirements for examinations and the proper recording of their results. Thus, the Court can take notice of these because the notice aspect for which they are being offered is not dependent upon whether those citations are ultimately affirmed or not. Tr. 151.

With that predicate, Hatfield believed that, as he kept finding the same type of violation, that the mine seemed to be taking a "cavalier attitude" about the requirements. Tr. 152. Thus, he was advising them that with the repeated nature of these violations, the negligence attributable to them was going to be higher with future failures of its obligation to both make and then record the examinations regarding air quality. Tr. 153. In fact, Inspector Hatfield spoke to Roger Justice and Ralph Tabor about this very issue. Tr. 154.

The relevance of this warning is displayed with Order 8081212, issued April 20, 2009, because that was only two days after the heightened alert warning. Tr. 155. For this violation Hatfield noted that the preshift would have been made for the 002 MMU on the day shift and that no record of methane readings were taken for nine working places. Tr. 156. This finding prompted him to order that the miners be pulled from the face until the methane readings were taken and recorded. Tr. 157. While no methane was found, the presence of methane can develop at any time; methane is endemic to coal mines. Hatfield's notes for this violation are found within GX 1 for the April 20, 2009 inspection, at page 8. Tr. 158-159. No methane record was reflected in the books.[20] Tr. 159. The methane readings and the air quality readings should have been recorded.[21]

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[19] "AMPs" refers to air measurement points, for air going in. Tr. 155. "Eps" refers to evaluation points for air going out. Tr. 155.

[20]Marty Deck was the individual who made the preshift exam on the 002 on that day. Frank Pearson was the individual who took the call from Deck and wrote down the results. Tr. 160-161. Pearson was described by Hatfield as the "general manager" or "head boss" at the mine. Tr. 161.

[21]Hatfield pointed to other instances where the correct information was recorded, noting an instance where it reflected "zero percent methane" and 20.8 percent oxygen. Tr. 164. Thus,

Importantly, Hatfield reiterated that he had previously spoken to management, that is prior to April 20th, about their failure to properly keep the record books. Tr. 162. That is his practice when he issues a citation; he talks to the mine representative about the standard for which he has issued a citation and its requirements. Tr. 163, 165. Hatfield listed the gravity as unlikely because the violation was for failure to make the record, and he could not state that the company did not take a reading, (or that they did). What he could determine was that no record was made. Tr. 167. Hatfield did feel that lost workdays was the appropriate description because if there was an accumulation of methane there could be a "pop" resulting in burns. Tr. 167. Still, focusing upon the recordkeeping aspect, he did not list the violation as "significant and substantial." Tr. 167. However, those findings did not dissuade Hatfield from listing the negligence as "high" nor from issuing his D order. He noted, correctly, that a non-S&S finding and unwarrantability are not mutually exclusive. Tr. 168.

Respondent then turned to its Exhibits, marked for identification as 2 and 3.[22] Inspector Hatfield identified R's Ex. 2 as the preshift exam for a citation in issue, number 8081212. Regarding Hatfield's notes for that, Hatfield stated that he does not recall speaking personally to Mr. Pearson or Mr. Deck, but that he had been told by Ralph and Roger that issues regarding citations are brought to Mr. Pearson. Tr. 213. Hatfield was next asked about GX 12, and upon reviewing it, stated that he did not know if Pearson or Deck had received additional training. Tr. 216. On redirect, Hatfield stated that he had never seen any certificates of training for anyone on the crew nor for foremen, with respect to the methane and dust control violations involved in this litigation. Tr. 225. Instead, all he was given were copies of 5000-23s, which deal with refresher training. Tr. 225. While the belt line is distinguishable from the working face, it is still an area of the mine where people normally work or travel, so it is an active area and must be preshifted. Tr. 216. The same statement applies to the man trip roadway. Tr. 216-217. As for abandoned panels, which Hatfield noted in his citation for 1206, there is a requirement to preshift three hours before men come to that section if intake air passes such abandoned works and is used to ventilate the working section. Tr. 217. Hatfield agreed that the missing element from the preshift, which caused the citation to be issued, was the failure to record the methane reading results. Tr. 218. No methane was found when the reading was taken to abate the citation. Tr. 219. Methane readings were taken during the on-shift.

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merely recording "NO" for "none observed" is insufficient. Tr. 165.

[22]As the Court's copy had no numbers on those exhibits, these were initially identified by counsel as exhibit 2 which lists "4/20/09, First Right" at the top of the page. Tr. 207. R's Ex. 1, a voluminous FOIA report, was not admitted after all because the Respondent agreed that its sole purpose was to show that Hatfield's map was not included in the FOIA response, as a basis to impeach the credibility of the map. The Court accepted R's Counsel's representation that the map was not so included. As it turned out R's Ex. 3 was never brought up during counsel's cross exam, so it was never offered into evidence. Tr. 223.

To comply with standard he cited, Hatfield had the mine conduct a training class to ensure that the examiners are filling out the books correctly. Tr. 225. The essential problem here was that when the section foreman for the oncoming shift would review the books for hazards, there was no listing for methane. Accordingly that person would not know if they found methane or not. Tr. 227.

Marty Deck was called as a witness for the Respondent. Deck is an electrician at the mine and held the same position back in April 2009. Tr. 302. He was also shown GX 1, pertaining to Citation 8081212. While Deck did not have his glasses on the day of testimony, and needed them, nevertheless he knew that the citation was issued because he failed to record the methane reading. Tr. 304. On cross-examination, when shown R's Ex. 2, he agreed that Roger Justice's initials were recorded there. This meant that Justice filled out the form for him. Deck stated that, as he rarely filled out such forms, both Justice and and Frank Pearson helped him complete the form. Tr. 309-310. Yet, Deck stated that he is part of mine management. Tr. 310.

Witness Frank Pearson, at the time of the citations in issue here, had responsibilities then which were the same as presently. That is, to consult on any problems the mine may have in a wide number of matters. These include production, safety, human resources and equipment. Tr. 334. He admitted that he was a part of mine management, at least loosely speaking. Tr. 334-335. He believed it was more accurate to describe his role as one of oversight. Tr. 335. Pearson was asked about Order No. 8081212. For this, he denied that Jack Hatfield ever told him to make sure the preshift book was correctly filled out. Tr. 326. Usually he does not fill out such books but on this day, he filled in and took the report in issue. Tr. 326. In this instance he took the "call out" on the phone, scribbled the information down. Then, after others provide their information, it is entered in the preshift examiner book. Tr. 327, and referring to R's Ex. 2, the preshift examiner's book. He took the report and he was the one who entered the information. *He admitted that he failed to fill out* "that top part." Tr. 327. While admitting this failure, he added that it used to be that one did not have to include such information. Tr. 328.

On cross-examination, Pearson admitted that he was not a novice to mining, having been vice-president of Trinity Coal and with the operations of six mines. Tr. 333. Amazingly, despite stating that he has had 38 years of coal mining experience, Pearson stated that in that entire experience he has never been privy to knowing of an MSHA inspector telling an operator to be on heightened alert, nor of even being warned not to violate a standard again. Tr. 348.

Although the violation identified in Order No. 8081212 was established, the Court concludes that, in the entire context, were it not for the fact that the Respondent had been warned about the requirement to record methane levels and that the failure was brought about by one who was clearly part of management, it might have been tempted to find a lesser degree of negligence than that advocated by the Secretary. Again, whether those prior citations were established or conceded or otherwise disposed of, it is the fact of prior warnings about this problem, not how they were resolved, that is critical. Thus, given the failure by management coupled with the warnings to adhere to the very requirement cited, high negligence, aggravated conduct, and

consequently the designation of unwarrantability is inescapable.

Despite the foregoing, contrary to the Secretary's urging, the Court concludes here that, in the complete context, a higher penalty is not appropriate. Hatfield noted that the likelihood was "unlikely" as he described the violation as a "recordkeeping" violation. Tr. 221. That does not mean that the violation should not be considered to be of minimal consequence because, as Inspector Hatfield expressed it, his "concern with that mine, once again, was the amount of water up - - entrapped overhead in the Big Mountain 16. And these hilltop mines, they're apt to encounter methane and blow up." Tr. 221. Along with that concern, he expressed that, although the failure *to record* a methane reading would not, by itself, make an injury likely to occur, one can encounter methane *at any time* and therefore designating the violation as having "no likelihood" would be an understatement. Tr. 221-222. However, Hatfield was not contending that the omission was intentional, but rather that it was "high negligence" because of the number of citations that he had served on mine management on this matter. Noting that the violation was not designated as significant and substantial, even considering its unwarrantable nature, the penalty does not deserve to be increased.

ORDER

The section 104 (d)(1) citation, No. 8081161, and the two section 104(d)(1) orders, Nos. 8081168 & 8081212, are hereby affirmed. Each of the special findings included with the citation and the orders are affirmed. Respondent, Mountain Edge Mining, Inc., is directed to pay within 40 days of the date of this decision, civil penalties as follows: $70,000.00 for Citation No. 8081161, $54,732.00 for Order No. 8081168, and $2,341.00 for Order No. 8081212. Upon payment of the penalty, totaling $127,073.00, these proceedings are DISMISSED.

William B. Moran
Administrative Law Judge

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